

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 182 of 1978

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed
to see the judgements? Yes

2. To be referred to the Reporter or not? No

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3. Whether Their Lordships wish to see the fair copy
of the judgement? No

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge?
No

EXECUTIVE BOARD OF THE METHODIST CHURCH IN S. ASIA

Versus

HEIRS OF MANILAL BHIKHABHAI PARABIA

Appearance:

MR MC BHATT for Petitioner

Respondent served

CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 04/03/97

ORAL JUDGEMENT

This appeal filed under section 100 of the Code
of Civil Procedure, 1908 is directed against judgment and
decree dated October 18, 1977 rendered by the learned
Joint Judge, Baroda, in Regular Civil Appeal no.66/76 by
which the judgment dated January 31, 1976 passed by the
learned 3rd Joint Civil Judge (J.D.), Baroda dismissing

Civil Suit no.645/71 filed by the appellant is confirmed.

2. The Second Appeal was placed for admission hearing before the Court on April 27,1978 and following order was passed :-

"Admit as per substantial grounds mentioned in the memo of appeal."

3. In the memorandum of Second Appeal, the substantial questions of law involved in the appeal are stated as under :-

"(i) Whether in the facts and circumstances of the case, the Lower Appellate Court made a substantial error of law in holding that the respondent-defendant is a tenant and not a licensee in respect of suit premises ?

(ii) Whether in the facts and circumstances of the case, the Lower Appellate Court made a substantial error of law in discarding from consideration the suit agreement (Exh.22) on the grounds not pleaded under Order-8 Rule-5 of the Code of Civil Procedure,1908 ?

(iii) Whether in the facts and circumstances of the case, the Lower Appellate Court made a substantial error of law in taking into consideration extraneous and irrelevant provisions of Section 91 of the Indian Evidence Act ?"

4. In order to appreciate the background in which the above referred to substantial questions of law arise for consideration of the Court in this appeal,it would be advantageous to refer to relevant facts.

5. Methodist Church in Southern Asia is a trust registered under the provisions of Bombay Public Trusts Act,1950. The affairs of the Trust are being managed by the Executive Board. Mr. Samual Virjibhai Christian is one of the Directors of the Executive Board of the Trust which looks-after properties belonging to the Trust. Formerly there was Butlar Memorial Hospital. Original defendant i.e. Manilal Bhikhabhai Parabha, who was washerman by profession, was allotted the suit premises as he was washing clothes being used in the Hospital. It was the case of the appellant that deceased Manilal Bhikhabhai Parabha was allowed to stay as a licensee and use two rooms with open space and ghat to enable him to

wash clothes. Somewhere in the year 1966, the Hospital was closed. According to the appellant, the washerman being poor, was permitted to stay in the suit premises and a paltry sum of Rs.15/- per month by way of water charges was being charged from him. According to the case pleaded in the plaint, the suit premises were required for the purpose of Technical School being run by the Trust and original defendant was requested to vacate the suit premises, but as original defendant did not vacate the premises, an agreement of licence was entered into on November 15, 1969, pursuant to which the defendant had agreed to pay Rs.15/- per month by way of water charges and the appellant had agreed to give free education to his son in Technical School being run by the Trust. It was the case of the appellant that the original defendant had agreed to hand over possession of the suit premises on completion of study of his son and son being employed, but as the original defendant did not vacate the premises, he was served with a notice dated November 17, 1970 calling upon him to hand over possession of the suit premises. The appellant claimed that inspite of service of notice, the original defendant failed to hand over possession of the suit premises to the appellant. Under the circumstances, the appellant instituted Regular Civil Suit no.645/71 in the Court of learned Civil Judge (J.D.) at Vadodara for possession of suit premises and mesne profits.

6. The original defendant resisted the suit by filing written statement at exh.8 and controverted the averments made in the plaint. The main contention raised by the original defendant was that he was tenant of the suit premises and not a licensee. The original defendant in the written statement claimed that he was paying rent at the rate of Rs.15/- per month which included taxes also and as he was residing in the suit premises since many years, the appellant was not entitled to decree claimed in the plaint. It was also stated by him in the written statement that writing dated November 15, 1969 was got executed from him under special circumstances, but real relationship between the parties was that of landlord and tenant. By filing written statement, the original defendant demanded dismissal of the suit.

7. The plaintiff-Trust examined (i) Samual Virjibhai Christian at exh.21, (ii) Rajnikant Manilal Christian at exh.41, and (iii) Ithiel Virji Master in support of its case pleaded in the plaint. The defendant examined himself at exh.42 in support of the case pleaded by him in the written statement.

8. On appreciation of evidence, the learned Judge held that the plaintiff failed to prove that the defendant was a licensee of the suit premises. The learned Trial Judge negatived the claim of the plaintiff that the plaintiff had terminated licence of the defendant and was, therefore, entitled to possession. The learned Trial Judge also disbelieved the case of the plaintiff regarding damages. In view of these conclusions, the learned judge dismissed the suit filed by the plaintiff vide judgment and decree dated January 31,1976.

9. Feeling aggrieved by the judgment and decree rendered by the Trial Court, the appellant preferred Regular Civil Appeal no.66/76 in the District Court at Vadodara. The learned Joint District Judge, who heard the appeal, dismissed the same by judgment and order dated October 18,1977, which has given rise to present Second Appeal.

10. The learned Counsel for the appellant submitted that status of the original defendant was that of a licensee which is evident from receipts produced by the appellant indicating payment of Rs.15/- per month towards water charges and, therefore, the suit filed by the appellant ought to have been decreed by the Courts below. It was argued that by executing deed on November 15,1969 the original defendant had accepted the position that he was merely a licensee of the suit premises and, therefore, suit for possession filed by the appellant should be decreed by the Court in Second Appeal. What was claimed by the learned Counsel for the appellant was that even if the original defendant was held to be tenant of the suit premises, he had surrendered his rights by execution of deed on November 15,1969 and, therefore, the Second Appeal deserves to be allowed.

11. Though the respondent is duly served, he has not appeared in the matter either in person or through an advocate.

12. It is common knowledge that several landlords do attempt to by-pass the provisions of the statues affording protection to the tenants against evictions by entering into contracts which have a superficial appearance of licences. Therefore, it is the duty of Courts to go behind the facade and find out the real nature of the contract. A lease is defined in section 105 of the T.P.Act,1882 as follows:-

A licence is defined in Section 52 of the Indian Easement Act, 1882 as follows :-

"105. A lease of immovable property is a transfer of a right to enjoy such property made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium, and rent defined:- The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."

A licence is defined in Section 52 of the Indian Easement Act, 1882 as follows:-

"52. Where one person grants to another, or to a definite number of other persons, a right to do or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence."

From the above definitions, it is seen that there is a marked distinction between a lease and licence. In the case of a lease there is exclusive possession of the premises. A lease creates interest in the property while a licence does not create interest in the property. The crucial test in each case is whether the instrument is intended to create or not to create an interest in the property. To ascertain whether a document creates a licence or the lease, the substance of the document must be preferred to the form. Attendant circumstances should also be taken into account to ascertain intention of the parties.

In the light of above-referred to settled principles, substantial questions of law formulated in the appeal require to be considered.

13. From the facts which are held to have been proved by both the Courts, it is evident that the original defendant was in exclusive possession of the suit premises for a period of about more than 50 years before

filing of the suit. Formerly there was Butlar Memorial Hospital. The original defendant was a washerman in life and was allotted suit premises, as he was washing clothes being used in the Hospital. The said Hospital was closed somewhere in 1966, but thereafter also the original defendant was permitted to stay in the premises though he had nothing to do with the Technical School being run by the plaintiff-Trust nor was connected in any manner with any other activities of the Trust. As is evident from the record, the original defendant was paying Rs.15/- per month being water charges not only during period when Butlar Memorial Hospital was functioning, but even after its closure also. Under the circumstances, the mention made in the deed dated November 15,1969 that the original defendant was to pay Rs.15/- per month by way of water charges, is of no consequences and cannot be considered to be determinative in character while ascertaining the intention of the parties.

14. A genuine relationship of the licensor and licensee can conceivably arise in the following circumstances :-

- (i) A property owner may have an occasion to oblige a relation or friend in need of accommodation and in view of the special relationship may grant the premises for temporary use without intending to create a lease so that the premises not needed by him at the moment may not remain idle whilst his needy friend or relative suffers avoidable hardship.
- (ii) An owner of the property may suddenly have an occasion to go to some other place for a temporary period and instead of allowing the premises to remain idle he permits someone in whom he has trust to occupy the same to meet the temporary need of the latter which may coincide with his temporary period of absence.
- (iii) A property owner may accept someone as a paying guest while he himself retains possession of the property as the principal occupant.
- (iv) In such cases even if some occupation fees are charged, it would not matter as in essence the relationship of licensor and licensee can be spelled out in view of the backdrop.

15. As noted above, the mere fact that the

relationship is enmasked by the label of 'license' is not decisive. The make up has to be removed and the real profile of the relationship has to be identified. It is an admitted position in the present matter that there was no special relationship between the appellant on one hand and the original defendant on the other. They were/are not related to each other. Nor was there a relationship of friendship. It is also an admitted position that this is not a case where the premises had suddenly fallen vacant and in view of some special circumstances the plaintiff being unable to use, it had given the same for temporary occupation to the original defendant in order that the premises did not remain idle. The fact that the original defendant was in occupation of the premises for a period of more than 50 years before filing the suit is not disputed by the plaintiff and is an indicator in itself. It is also an admitted position that since inception the original defendant was in exclusive possession of the premises given to him. Having regard to the proved facts and surrounding circumstances, it is evident that the relationship between the plaintiff and the original defendant was one of landlord and tenant, though in order to extricate from the clutches of Rent Act certain expressions were used in the deed dated November 15,1969 to indicate that licence was created. The fact that original defendant was poor and illiterate is not in dispute. Under the circumstances, his case that in view of the special circumstances then prevailing deed dated November 15,1969 was got executed from him deserves to be considered. A person who is let into exclusive possession, is prima-facie to be considered as tenant subject to the rider that attendant circumstances may negative any intention to create a tenancy. The appellant has failed to prove attendant circumstances to negative intention to create a tenancy. If a cumulative view, of all the facts proved in the case and attendant circumstances, is taken, there is no manner of doubt that the real nature of transaction was/is of lease and not of licence. In the present case, it is established beyond any doubt that the original defendant was in exclusive possession, he was paying compensation and that conduct of the plaintiff before execution of deed dated November 15,1969 was such from which it can be reasonably inferred that intention of the parties was to create tenancy. Where a servant is required to live in the premises for better performance of his duties, it may be a case of licensee known as "service occupation". However, where servant occupies premises for a purpose other than better performance of his duties, it would be a case of tenancy. As noted earlier, after closure of Butlar Memorial Hospital the original defendant was not connected in any

manner whatsoever with any of the activities of the plaintiff-Trust. It is not the case of the plaintiff that original defendant was permitted to occupy premises for the purposes of the Trust. The evidence shows that the original defendant was washing clothes of other persons residing in nearby areas also. Meaning thereby, he was occupying the premises for a purpose other than better performance of his duties. Under the circumstances, it will have to be held that it was a case of tenancy and not a case of licensee as pleaded by the plaintiff.

16. The plea that the original defendant had surrendered tenancy rights, if any, by execution of deed dated November 15, 1969, has also no merits. In absence of any clear statement or indication in the deed or conduct of the parties, surrender of tenancy rights cannot be readily inferred. Before surrender of tenancy rights it must be accepted by all concerned that the person surrendering tenancy rights, was tenant of the premises. Right from the beginning, the appellant has asserted that the original defendant was never tenant of the suit premises. As the appellant never accepted claim of the original defendant that he was tenant of the premises, there is no question of considering the case of surrender of tenancy rights by the original defendant. Therefore, no decree can be passed in favour of the appellant on the ground that tenancy rights, if any, were surrendered by the original defendant when he executed deed dated November 15, 1969.

17. Both the Courts have correctly applied well settled tests to the proved facts while ascertaining intention of the parties. The ascertainment of intention of the parties from the proved facts is essentially a question of fact and not liable to be interfered with in Second Appeal. In my view, the learned Trial Judge as well as the learned Appellate Judge were perfectly right in taking the view that real nature of the transaction was one of 'lease' and not of 'licence'. The finding of fact of the first appellate court which is final Court of fact, is not affected by any of the errors at all. Pure findings of fact are reached by the first appellate court on re-appreciation of relevant evidence. The findings of fact are neither contrary to law nor vitiated by failure to determine any material issue of law. On the facts and in the circumstances of the case, it cannot be said that the findings arrived at by the Courts below have occasioned failure of justice. Therefore, the substantial questions of law framed by the Court are answered in negative and against the appellant. In view

of the above discussion, the appeal is liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed, with no order as to costs.

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